(8) (11) (8)

Nos. 88-854, 88-856, and 88-870

Supreme Court, U.S.
FILED
JUN 13 1989
SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PETER CHEMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NICHOLAS LONGO AND EDWARD FAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

DAVID K. FLYNN
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

56pp

QUESTION PRESENTED

Whether the district court properly imposed civil contempt sanctions against individual members of the Yonkers City Council, when those Council members were obstructing the City of Yonkers' compliance with that courts' valid orders to remedy illegal racial segregation of the City's public and subsidized housing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Summary of argument	18
Argument:	
The district court properly imposed civil contempt sanctions against individual members of the Yonkers City Council for obstructing the City of Yonkers' compliance with valid court orders	22
A. The district court has authority to impose civil contempt sanctions against individual members of the Yonkers City Council for obstructing the City of Yonkers' compliance with valid court orders	22
B. The doctrine of legislative immunity does not shield individual members of the Yonkers City Council from sanctions for obstructing the City of Yonkers' compliance with valid court orders	27
C. The First Amendment does not shield individual members of the Yonkers City Council from sanctions for obstructing the City of Yonkers' compliance with valid court orders	39
D. The district court properly exercised its discretion to bring about compliance with its orders by holding individual members of the Yonkers City Council in contempt rather than by ordering legislation into effect itself or by appointing a commission to do so	42
Conclusion	48

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	25, 37
Aitchison v. *Raffiani*, 708 F.2d 96 (3d Cir. 1983)	29
Alemite Mfg. Corp. v. *Staff*, 42 F.2d 832 (2d Cir. 1930)	23
Alexander v. *Holmes County*, 396 U.S. 19 (1969)	36
Amy v. *The Supervisors*, 78 U.S. (11 Wall.) 136 (1870)	30
Anderson v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821)	42, 43

Cases – Continued: Page

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 35
Bessette v. *W.B. Conkey Co.*, 194 U.S. 324 (1904) 23
Board of Commissioners v. *Aspinwall*, 65 U.S. (24 How.) 376 (1860) 31, 35
Bond v. *Floyd*, 385 U.S. 116 (1966) 37
Brown v. *Board of Educ.*, 349 U.S. 294 (1955) 33, 36
Bruce v. *Riddle*, 631 F.2d 272 (4th Cir. 1980) 29
Bush v. *Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960) 33
Bush v. *Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La.), aff'd *sub nom. Denny* v. *Bush*, 367 U.S. 980 (1961) 33
Butz v. *Economou*, 438 U.S. 478 (1978) 19, 27, 32
City of Galena v. *Amy*, 72 U.S. (5 Wall.) 705 (1866) 31
Clark v. *Marengo County*, 623 F. Supp. 33 (S.D. Ala. 1985), aff'd, 811 F.2d 609 (11th Cir. 1987) 37
Clarke v. *United States*, 705 F. Supp. 605 (D.D.C. 1988', appeal pending, No. 88-5439 (D.C. Cir.) 40, 41
Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449 (1979) ... 20, 36
Commissioners v. *Sellew*, 99 U.S. 624 (1878) 31, 32, 33
Connett v. *City of Jerseyville*, 125 F.2d 121 (7th Cir. 1942) 31
Connick v. *Myers*, 461 U.S. 138 (1983) 41
Cooper v. *Aaron*, 358 U.S. 1 (1958) 19, 27
Copenhaver, In re, 54 F. 660 (C.C.W.D. Mo. 1893) 31
County Commissioners v. *Wilson*, 109 U.S. 621 (1883) ... 31
East St. Louis v. *Amy*, 120 U.S. 600 (1887) 30
Espanola Way Corp. v. *Meyerson*, 690 F.2d 827 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983) 29
Forrester v. *White*, 108 S. Ct. 538 (1988) 19, 20, 27, 28, 32
Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911) 22, 23
Gorman Towers v. *Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) 29
Gravel v. *United States*, 408 U.S. 606 (1972) 29, 39
Green v. *County School Bd.*, 391 U.S. 430 (1968) 36, 44
Griffin v. *County School Bd.*:
377 U.S. 218 (1964) 34, 36
363 F.2d 206 (4th Cir. 1966) 25
Gunn v. *University Committee*, 399 U.S. 383 (1970) 23

Cases—Continued: Page

Hernandez v. *City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982) 29
Jordan v. *City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984) 37
Kendall v. *Stokes*, 44 U.S. (3 How.) 86 (1845) 35
Kilbourn v. *Thompson*, 103 U.S. 168 (1880) 39
Kuzinich v. *County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982) 29
Labette County Commissioners v. *Moulton*, 112 U.S. 217 (1884) 31
Lac Vieux Desert Band of Lake Superior Indians v. *Waterssmeet Township*, No. M82-161 CA (W.D. Mich. Sept. 2, 1987) 36
Lake Country Estates, Inc. v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) 28, 29, 39, 40
Lennon, In re, 166 U.S. 548 (1897) 23, 25, 26
Local 28, Sheet Metal Workers v. *EEOC*, 478 U.S. 421 (1986) 44
Louisiana v. *United States*, 380 U.S. 145 (1965) 33
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) 33
Mobile v. *Watson*, 116 U.S. 289 (1886) 30-31
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 29, 36
People ex rel. Pierce v. *Guggenheimer*, 44 App. Div. 399, 60 N.Y.S. 703 (1899) 31
Powell v. *McCormack*, 395 U.S. 486 (1969) 36, 37
Reed v. *Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) 29
Rees v. *City of Watertown*, 86 U.S. (19 Wall.) 107 (1873) 31
Regal Knitwear Co. v. *NLRB*, 324 U.S. 9 (1945) .. 18, 23, 26, 33
Reynolds v. *Sims*, 377 U.S. 533 (1964) 43-44
Riggs v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867) ... 31
Shillitani v. *United States*, 384 U.S. 364 (1966) 18, 22, 42, 43
State ex rel. Baumann v. *Judge*, 38 La. Ann. 43 (1886) ... 31
State ex rel. Edwards v. *District Court*, 41 Mont. 369, 109 P. 434 (1910) 31
Supervisors v. *Rogers*, 74 U.S. (7 Wall.) 175 (1869) 43

Cases—Continued: Page

Supervisors v. *United States*, 71 U.S. (4 Wall.) 435 (1866) 31
Supreme Court of Virginia v. *Consumers Union*, 446 U.S. 719 (1980) 20, 28, 35, 36, 39
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 33, 44
Tenney v. *Brandhove*, 341 U.S. 367 (1951) 28, 32, 39, 40
The President ex rel. Moran v. *Mayor*, 40 F. 799 (C.C.D.N.J. 1889) 31
United States v. *Ballin*, 144 U.S. 1 (1892) 26
United States v. *City of Parma*, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982) 36
United States v. *Fleischman*, 339 U.S. 349 (1950) 26, 33
United States v. *Gillock*, 445 U.S. 360 (1980) 20, 28-29, 34, 36, 37
United States v. *Green*, 53 F. 769 (C.C.W.D. Mo. 1892) .. 31
United States v. *Hall*, 472 F.2d 261 (5th Cir. 1972) 25
United States v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) 22
United States v. *Lovasco*, 431 U.S. 783 (1977) 24-25, 37
United States v. *Nixon*, 418 U.S. 683 (1974) 20, 34
United States v. *Onslow County*, 683 F. Supp. 1021 (E.D.N.C. 1988) 37
United States v. *Paradise*, 480 U.S. 149 (1987) 43
United States v. *Town of Cicero, Illinois*, No. 83 C 413 (N.D. Ill. May 15, 1986) 36
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 22, 33, 44
United States v. *Yonkers Bd. of Educ.*:
624 F. Supp. 1276 (S.D.N.Y. 1985) 2, 3
635 F. Supp. 1577 (S.D.N.Y. 1986) 3, 4, 5
No. 80 CIV 6761 (S.D.N.Y. May 28, 1986) 3
675 F. Supp. 1407 (S.D.N.Y. 1987) 8
675 F. Supp. 1413 (S.D.N.Y. 1987) 9
837 F.2d 1181 (2d Cir. 1987), certs. denied, 108 S. Ct. 2821 (1988) 9, 13, 23
No. 89-6050 (2d Cir. Apr. 17, 1989) 38
United States ex rel. Huidekoper v. *Buchanan County*, 24 F. Cas. 1288 (C.C.W.D. Mo. 1878) (No. 14,679) ... 31
United States ex rel. Jones v. *City of West Palm Beach*, 94 F.2d 320 (5th Cir. 1938) 31

Cases – Continued: Page

United States ex rel. Thompson v. *Lee County*, 26 F. Cas. 911 (C.C.N.D. Ill. 1869) (No. 15,589) 31
United States ex rel. Watts v. *Justices of Lauderdale County*, 10 F. 460 (C.C.W.D. Tenn. 1882) 31
Von Hoffman v. *City of Quincy*, 71 U.S. (4 Wall.) 535 (1866) 31
Westfall v. *Erwin*, 108 S. Ct. 580 (1988) 30, 32
Wise v. *Lipscomb*, 437 U.S. 535 (1978) 43
Wrzeski v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983) 40
Yonkers Racing Corp. v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), cert. denied, 109 S. Ct. 1527 (1989) .. 12, 18, 38
Yost v. *Dallas County*, 236 U.S. 50 (1915) 30, 43
Young v. *United States ex rel. Vuitton*, 481 U.S. 787 (1987) 22

Constitution, statutes, regulations, and rules:

U.S. Const.:
Art. I, § 6, Cl. 1 (Speech or Debate Clause) .. 19, 28, 37, 39
Art. III 33, 47
Amend. I 21, 39, 40, 41, 42
Amend. XIV (Equal Protection Clause) 3
Civil Rights Act of 1871, 42 U.S.C. 1983 ..... 28, 29, 30, 35
Civil Rights Act of 1968, Tit. VIII (Fair Housing Act), 42 U.S.C. 3601 *et seq.* 3, 29, 36
District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, Tit. I, § 145, 102 Stat. 2269 40
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* 36
18 U.S.C. 401 22
N.Y. Pub. Off. Law § 2 (McKinney 1952) 26
City of Yonkers Charter (1966):
Art. II, § C2-5 10
Art. III, § C3-1.A 34
Art. IV:
§ C4-1 34
§ C4-2 34

Regulations and rules – Continued: Page

24 C.F.R.:
Section 570.301(a)(4) 4
Section 570.304(b) 4
Section 570.306 4
Fed. R. Civ. P.:
Rule 65(d) 18, 23, 25, 26, 33
Rule 70 ..... 18, 23, 43
Rule 71 ..... 18, 23, 26

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-854

HENRY G. SPALLONE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-856

PETER CHEMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-870

NICHOLAS LONGO AND EDWARD FAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 856 F.2d 444.[1] The pertinent orders and opinions of the district court contained in the joint appendix are unreported: order requiring compliance with consent decree, July

---

[1] "Pet. App." refers to the appendix to the petition in No. 88-854.

26, 1988 (J.A. 397-400); modification letter, July 28, 1988 (J.A. 401); oral opinions finding petitioners in civil contempt, August 2 and 4, 1988 (J.A. 429-431, 443, 475-476); order adjudicating petitioners in civil contempt, August 2, 1988 (J.A. 445-447).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1988. The petitions for a writ of certiorari were each filed on November 23, 1988, and were granted on March 6, 1989.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT[3]

1. After more than 90 days of trial, the district court issued a decision on November 20, 1985, holding the City of Yonkers liable for a pattern and practice of intentional racial discrimination in the selection of sites for public and subsidized housing. *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985).[4] The district court held that the

---

[2] The Court limited its grant of certiorari in No. 88-856 to the first five questions presented in the petition. J.A. 624.

[3] The contempt adjudications at issue arose during the remedial phase of the civil rights action initiated in 1980 by the United States against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. Because the orders before this Court must be reviewed within the context of the efforts by the City of Yonkers and the Yonkers City Council to block compliance with the district court's remedial orders, we set forth in some detail the procedural history of this case.

[4] The district court also held the City of Yonkers and the Yonkers Board of Education liable for systemwide racial segregation in the Yonkers public schools. *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1376-1545 (S.D.N.Y. 1985).

The Yonkers Branch of the National Association for the Advancement of Colored People (NAACP) and an individual minority student, by her next friend, moved to intervene in the action as plaintiffs. In June 1981, the district court granted leave to intervene and later certified the action as a class action on behalf of all black residents of Yonkers who were residents of, or eligible to reside in, public or subsidized housing in Yonkers, or who were parents of students attending public school in Yonkers. See 624 F. Supp. at 1288 n.1.

City had violated the Equal Protection Clause of the Fourteenth Amendment and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, by deliberately concentrating virtually all of its public and subsidized housing in the southwest quadrant of Yonkers. The City's purpose, the court specifically found, was to maintain racial segregation. The court based its holding in large part upon the actions and inactions of the Yonkers City Council and individual Council members. See 624 F. Supp. at 1295-1328, 1342-1363, 1369-1372. In sum, the court found that "for more than thirty years, the site selection process for subsidized housing was dominated by the unwillingness of the City Council to approve or support a site in the face of community opposition," and that this unwillingness was motivated in significant part by "the desire to preserve existing patterns of segregation." *Id.* at 1371.[5]

Following remedial proceedings, on May 28, 1986, the district court entered its "Housing Remedy Order," requiring the City to take a number of actions—including legislative action by the City Council—designed to facilitate the development of public and other subsidized housing outside Southwest Yonkers. *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986). Part IV of the Housing Remedy Order required the City to designate sites for 200 units of public housing in East Yonkers, and to submit both an acceptable Housing Assistance Plan (HAP) and an executed grant agreement to HUD. The Order provided that if the City failed to comply with these requirements, the plaintiffs were to submit the HAP, the

---

[5] Evidence of segregative intent included City Council members' acquiescence in the community's racially influenced opposition to public and subsidized housing outside areas of minority concentration (624 F. Supp. at 1369-1372), the City Council's reluctance to seek federal Section 8 housing certificates, and, when the certificates were obtained, the confining of their use to minority families only in Southwest Yonkers (*id.* at 1342-1363).

The district court also issued supplemental findings of fact following the remedial hearings, concluding that the City had continued its pattern of discriminatory practices through the date of the Housing Remedy Order. *United States* v. *Yonkers Bd. of Educ.*, No. 80 CIV 6761 (S.D.N.Y. May 28, 1986), slip op. 1-3.

grant agreement, and the proposed public housing sites to the court and, upon approval, the court would deem the submissions to have been made by the City. See *id.* at 1580-1581.[6]

Part VI of the Housing Remedy Order required the City to develop and implement a plan, known as the Long Term Plan, for the creation of assisted housing, other than public housing, outside Southwest Yonkers. See 635 F. Supp. at 1582. The district court declined to set a goal for the number of housing units to be developed under the Long Term Plan, to establish a timetable, or to prescribe how the housing should be provided. Instead, the court left to the City, and to the City Council, both the opportunity and the responsibility for proposing the substantive aspects of the Plan. The City was to submit a proposed Long Term Plan by November 1986. *Ibid.*

2. The City appealed the district court's orders. Although implementation of the Housing Remedy Order was not stayed (Pet. App. 6a), the City took "no significant action to comply with the 1986 Housing Remedy Order" during the year and a half that its appeal of the district court's orders was pending in the court of appeals (*id.* at 7a).

a. The City "totally defaulted" in its obligation to designate public housing sites under Part IV of the Housing Remedy Order (Pet. App. 6a). As a result, under the terms of the Order, the court deemed the City to have submitted three unused

---

[6] A grantee's submission of an acceptable HAP and execution of a grant agreement are prerequisites to the receipt of Community Development Block Grant (CDBG) funds. See 24 C.F.R. 570.301(a)(4), 570.304(b). The HAP, among other requirements, must set forth annual and three-year goals for the number, type, and general location of assisted housing units to be developed in the municipality, as well as the actions the grantee will take to achieve these goals. See 24 C.F.R. 570.306. The City had previously committed itself to provide sites for 200 units of assisted housing in East Yonkers as a condition to its receipt of CDBG funds, but had never honored that commitment. See 635 F. Supp. at 1580. The Housing Remedy Order's requirement that the City submit an HAP and execute a grant agreement thus required the City to reaffirm its commitment to the development of 200 units of public housing in East Yonkers. Submission of these documents was also needed to establish the Affordable Housing Trust Fund, which, with CDBG funds, will facilitate development of housing under the Long Term Plan. See *id.* at 1581-1582.

school sites to be used for 140 units of the housing. 635 F. Supp. 1580-1581.[7] In November 1986, the City also refused to submit a proposed Long Term Plan, as required by Part VI of the Order (Pet. App. 7a). In the following month, the United States moved to have the City held in contempt. Instead of imposing this sanction, however, the district court permitted the City to appoint an Outside Housing Advisor (Advisor) to assist it in carrying out the Housing Remedy Order (Pet. App. 7a; R. 233).

The Advisor reported to the court on his activities on April 9, 1987 (J.A. 35-46). In consultation with members of the City Council, Yonkers community groups, and local clergy, the Advisor was trying to identify additional public housing sites in order to reduce the number of units on two of the three already-designated sites, and to distribute the remaining units on sites scattered throughout East Yonkers (J.A. 36-38). At a hearing later that month, the Advisor identified eight such sites and explained how each could be made available for public housing. Among the sites were three unused parcels that Westchester County had given to the City for parkland (the County sites) (J.A. 57-59). Use of these sites for public housing required action by the County (J.A. 52).

b. On May 8, 1987, the City moved for an order modifying the Housing Remedy Order in accordance with a resolution passed by the City Council on April 15 (J.A. 69-78; see also J.A. 84-87). This resolution expressed the City Council's support for the Advisor's scattered site plan, but conditioned that support on a number of terms, including (1) a stay of all construction until the City had exhausted its appeals from the district court's orders; (2) limitations on the housing to be developed under the Long Term Plan; and (3) a requirement that committees of area residents screen all applicants for public housing (J.A. 65-68). Accordingly, the City's motion called for designation of scattered public housing sites by the Advisor in consultation with "site selection committees of local residents, community

[7] The City also refused to submit an HAP or to execute a grant agreement with HUD. Under the Housing Remedy Order, counsel for the United States prepared these documents, which the court deemed to have been submitted by the City.

leaders and elected officials from each affected ward of the City" (J.A. 71-72), and included conditions similar to those in the City Council's resolution (J.A. 73-74).

At a hearing on May 12, the district court offered to consider the City's motion and stated that it preferred a remedial plan that would "embody to the maximum possible extent consistent with the purposes of the housing remedy order the views of the community itself" (J.A. 87). The court asked the City to demonstrate that its motion was not merely a delaying tactic and suggested that it take the preliminary steps necessary to obtain control of the sites identified by the Advisor, namely, having the City Council pass a resolution requesting Westchester County to permit the City to use the County sites for housing (J.A. 87-91).

By June 23, 1987, the City Council had neither passed the suggested resolution nor taken any action to obtain the sites proposed for public housing (J.A. 104-108). At a hearing on that date, the City's attorney informed the district court that the City Council was trying to devise a politically acceptable plan, in which sites would be distributed "throughout the six wards," but the attorney could not assure the court that such a plan, or indeed any action by the City Council, would be forthcoming (J.A. 106, 108). The court reminded the City that the Advisor had been appointed and that his search for another plan had been undertaken as an alternative to civil contempt and other sanctions. The court stated that if the City Council did not pass a resolution within a week, the court would then assume that the Council did not intend to take any action (J.A. 106-108).

By July 1, 1987, the City had done nothing to advance its proposed alternative plan or otherwise comply with the Housing Remedy Order. Accordingly, on that date, on motions by the United States and the NAACP, the court entered an order requiring the City to take certain actions or risk contempt penalties. At the outset, the court found (J.A. 147):

> The City of Yonkers has failed to take many of the actions required by the Housing Remedy Order. Instead, the City has delayed meaningful remedial action and declined re-

> peated opportunities accorded to the City to act itself in the first instance in taking remedial action.

The July 1 Order, among other things, required the City to seek Westchester County's waiver of its reverter interest in the County sites (J.A. 150).[8] The Order provided that the City's failure to comply would result in a finding of contempt; the City would be fined at a base rate of $100 for the first day, and the amount would double for each day of noncompliance thereafter (J.A. 151-152).

The City Council responded by enacting three resolutions on July 7, 1987. Two of the resolutions related to the County sites.[9] Resolution No. 140-1987 (J.A. 143) complied with the court's July 1 Order by requesting Westchester County to waive its reverter interest in the County sites. Resolution No. 141-1987 (J.A. 144-147) sought action by the County as to two of the three County sites, but expressly conditioned that request on the granting of a stay of constructon pending appeal, a limitation on the number of units of housing to be developed under the Long Term Plan, and other terms (J.A. 146-147). The resolution concluded (J.A. 147):

> BE IT FURTHER RESOLVED, that in the event that any portion of this Resolution is not complied with[,] the entire Resolution be deemed null and void and with no effect.

In a telephone conference on July 9, the City's attorney and the City Manager told the district court that the City Council did not intend in Resolution No. 141-1987 to supersede its request to the County set forth in Resolution No. 140-1987 (J.A. 120-122); they also assured the court that the City would comply with the court's Order by furnishing the court and the plaintiffs

---

[8] The July 1 Order directed the Advisor to submit a proposed plan for the placement of all 200 units of public housing on the identified unused school sites, and specified that the Advisor would no longer function as the City's representative but would act solely as an advisor to the court. The Order also required the City to adopt and submit to HUD an acceptable HAP for its current CDBG funding application. J.A. 147-150.

[9] In the third resolution, the City Council adopted the City's HAP for the fiscal year 1986 (J.A. 141).

with copies of the City's requests before their transmission to the County (J.A. 120-122, 131; see also J.A. 139, 150).

Despite these assurances (and without notice to the court or the plaintiffs), the City, on July 10, transmitted to the County only the request set forth in Resolution No. 141-1987, with its qualifications and conditions (J.A. 154-159). At a hearing on July 15, the court found that the City's action had sent "a clear message" to the County that the City wanted the County to grant only the request set forth in that resolution, and to reject the waiver request required by the court's order and embodied in Resolution No. 140-1987 (J.A. 160-162). Although the parties drafted and the City sent to the County a letter withdrawing the July 10 submission (J.A. 163-167), the County later refused to waive its reverter interest in any of the County sites.

c. During the remainder of 1987, with the County sites apparently then unavailable, the City persisted in its refusal to advance either the public housing or the Long Term Plan aspects of the Housing Remedy Order.[10] In the meantime, the district court, the plaintiffs, and the Advisor continued to seek additional available housing sites. By November, the court had designated four unused school sites for public housing. See *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1407 (S.D.N.Y. 1987).[11] Use of these four sites alone, however, would have resulted in a greater density than the parties agreed was optimal (see, *e.g.*, J.A. 65-67, 72, 97). And the City still had taken no steps to identify sites or strategies for the development of housing under the Long Term Plan. Accordingly, the district

---

[10] Although the Advisor and the City had identified potential housing sites (see, *e.g.*, J.A. 53-56, 115-117, 145), the City took no action to make them available for public housing.

[11] In its order requiring the Yonkers Board of Education to return to the City title to the unused school sites that had been designated for public housing, the court stated (675 F. Supp. at 1410):

> It will come as no surprise to anyone familiar with the history of this litigation that the City has acted in a negative or at best neutral fashion with respect to all efforts to implement the Court's Housing Remedy Order, and that any initiatives to further such implementation have come from the Plaintiffs, Plaintiff-Intervenors, or the Court itself.

court directed the Advisor to identify existing development projects in Yonkers, as well as privately owned vacant sites, that might be used to advance implementation of the Housing Remedy Order. *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1413 (S.D.N.Y. 1987). Once again, the court gave the City the opportunity to chart the remedial course by choosing from among all the sites that had been or might be identified. *Id.* at 1415-1416.[12]

3. On December 28, 1987, the court of appeals affirmed the district court's liability and remedy orders "in all respects," concluding that the district court "properly applied the appropriate legal principles, that its findings of fact [were] not clearly erroneous, and that its remedial orders [were] within the proper bounds of discretion." *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), certs. denied, 108 S. Ct. 2821 (1988).[13] The court of appeals held that the requirements of the Housing Remedy Order were "plainly reasonable" and "necessary" in light of the City's "prior disregard of governmental urging that it select housing sites outside of Southwest," "its historical willingness to forgo federal funding in order to preserve segregrated housing patterns," "its past history of foot-dragging," and "its refusals to approve any site for low-income housing outside of" minority areas. 837 F.2d at 1236-1237.

---

[12] To prod the City to act, the court also imposed a freeze on all discretionary City actions in connection with four existing development projects in Yonkers until it was shown that these projects could not be used to advance the housing remedy goals, or until the City designated and obtained control of sites for all 200 units of public housing. In this order, the court recognized (675 F. Supp. at 1414):

> The progress to date in identifying available sites has been extremely disheartening and the attitude of the representatives of Yonkers has been to do nothing affirmative, to place the entire onus of implementation on the Court, and to engage in obstructive and dilatory tactics. To date, there have been untoward delays in implementing the Housing Remedy Order some 18 months after its promulgation. Only the threat of bankrupting fines has produced any action by the City.

[13] The court of appeals pointedly rejected as "frivolous" the City's contentions that its actions had not been racially motivated (837 F.2d at 1222).

4. For a brief period following the court of appeals' decision, the City finally seemed prepared to acknowledge and comply with its obligations under the Housing Remedy Order. That willingness, however, soon evaporated.

a. On January 19, 1988, the district court held a hearing at which it called upon the City to "advise what affirmative actions if any Yonkers is taking or planning to take to implement the housing remedy order" (J.A. 171). Counsel for the City responded that the parties had been negotiating an agreement on the actions the City would take (J.A. 178-181), but also conceded that the City had failed to submit a current HAP, as required by the original Housing Remedy Order and the July 1, 1987, Order (J.A. 171-174). The court stated that the City's submission of the HAP was a necessary first step to show a good faith effort to comply with the court's orders (J.A. 171, 175-176); accordingly, the court ordered the City to adopt the third-year HAP no later than January 21, 1988, or face contempt and bankrupting fines (J.A. 176-178).[14] After a recess, counsel for the City reported that a majority of the City Council had agreed to vote to adopt the HAP (J.A. 183-184). The court thereupon granted an adjournment until January 25 to enable the parties to continue settlement discussions on the other actions the City would take to comply with the Housing Remedy Order (J.A. 183-185).

On January 25, the parties informed the court that they had reached such an agreement in principle, designating seven sites for public housing and setting a goal of 800 units of housing to be developed under the Long Term Plan (J.A. 190-200).[15] The

---

[14] The court stated that it would notify the New York State Emergency Financial Control Board and the Governor of New York of any contempt adjudication (J.A. 176-178). Contrary to petitioner Chema's misleading suggestion (Chema Br. 5), the court's statement about replacing the City's elected officials with appointed officials (J.A. 182-183) referred not to action by the court itself but rather to possible action by those responsible state officers who have authority under state law to remove City officials from office. See Charter of the City of Yonkers art. II, § C2-5 (1966); Pet. App. 13a.

[15] At that proceeding, the court stated that if no agreement had been reached, it would have entered an order designating six public housing sites,

Yonkers City Council approved the agreement on January 27, and the district court entered the agreement, the "First Remedial Consent Decree In Equity" (Consent Decree) (J.A. 216-223), as a consent judgment on January 28 (Pet. App. 8a).

b. The Consent Decree set forth the actions the City would take in order to comply with Part IV (public housing) and Part VI (Long Term Plan) of the Housing Remedy Order. Sections 12 through 18 of the Consent Decree established the framework for the Long Term Plan that had been left unresolved in the original Housing Remedy Order (J.A. 220-223). The Decree set a goal of 800 units of assisted housing to be developed over four years in conjunction with market rate housing developments (J.A. 220-221); it also committed the City to specific actions needed to encourage private developers to build such housing (J.A. 220-222). In Section 17 of the Decree, the City expressly agreed to adopt legislation conditioning the future construction of multi-family housing in Yonkers on the inclusion of at least 20 percent assisted units, and providing for such private development incentives as zoning changes, tax abatements, and density bonuses (the Mandated Incentives) (J.A. 222). This legislation was to be enacted within 90 days after entry of the Decree (*ibid.*).[16] In Section 18, the parties acknowledged that certain "subsidiary issues" relating to the Long Term Plan were unresolved and agreed to work toward their resolution in a second consent decree to be entered by February 15, 1988 (J.A. 222-223).

c. Faced with intense public opposition to the Consent Decree, the City soon sought to disavow it. On March 21, the

---

but did not suggest that it would have taken any action at that time with respect to the Long Term Plan (J.A. 204).

[16] The Consent Decree specifically provided (J.A. 220):

> There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

Additional measures that the parties agreed to forgo for a time included the use of City-owned land (J.A. 221).

City moved to modify the Decree, and even promised to return nearly $30 million in federal funds if it was relieved of its duty to allow the development of public housing in white neighborhoods (Pet. App. 9a).[17] The district court denied the City's motion on March 31. The City then refused either to continue the Long Term Plan negotiations required by Section 18 of the Consent Decree or to enact the legislation required by Section 17 (*id.* at 9a-10a).

Undaunted by the district court's order, the City, on May 2, moved to vacate the Decree in its entirety, on the ground that the Archdiocese of New York (owner of St. Joseph's Seminary, a small part of which had been designated as a public housing site) had withdrawn its initial consent to the use of its property and no longer supported the Consent Decree as a whole (J.A. 225-244). Although the district court gave the City the opportunity to designate an alternative site, the City Council refused to do so. See J.A. 268-274; see also *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 859-861 (2d Cir. 1988), cert. denied, 109 S. Ct. 1527 (1989). In denying the City's motion to vacate, the district court found that in light of "[t]he decision of the city council not to designate or authorize the court to designate a substitute site," the City's motion had been "a transparent ploy * * * to avoid any responsibility for the court decree or implementation of the housing remedy order" (J.A. 275). The City sought no further review of that ruling.

5. In the meantime, the plaintiffs and the court attempted to implement the Consent Decree despite the City's refusal to cooperate. On May 2, the plaintiffs moved the entry of a Long Term Plan Order based upon a draft that the City's lawyers had prepared before the City withdrew from negotiations. On June 13, following comments from the City (J.A. 245-261), revisions by the plaintiffs, and a hearing (J.A. 275-303), the district court entered its Long Term Plan Order resolving the subsidiary issues left open by the Consent Decree and providing the detail for the

---

[17] This amount represented the CDBG funds that the City had received from HUD following its promise to provide sites for 200 units of such public housing. See pp. 3-4 and note 6, *supra*.

legislation that Section 17 required (J.A. 303-316). That Order accommodated most of the City's substantive objections to the plaintiffs' proposal (Pet. App. 9a-10a).[18]

Nonetheless, the City and City Council continued their campaign of unyielding resistance. On June 14, the City Council passed a resolution declaring a moratorium on all public housing construction in Yonkers—an unabashed defiance of the district court's Housing Remedy Order and the Consent Decree (J.A. 317-319).[19] On June 21, nearly two months after the deadline set in the Consent Decree for the City's enactment of the necessary implementing legislation (and more than two years after entry of the original Housing Remedy Order), the district court asked the City for a timetable for enactment of the legislation (J.A. 323). The City's attorney stated that a consulting firm had been retained to draft the legislation, but that its work had not yet begun, and that no action could be considered by the City Council until August at the earliest (J.A. 323-324).

The prospect of waiting until summer's end for the City to comply disturbed the court, particularly in light of the City Council's declaration of a public housing moratorium just the week before. The Court thus asked the City Council to pass a resolution at its next meeting adopting the provisions of the Consent Decree and the Long Term Plan Order, with the enactment of the legislation itself to take place after the City's consultants completed their work (J.A. 324, 331-340). The City Council refused. Indeed, on June 28, the Council defeated a resolution that would have required the City to honor its

---

[18] The City opposed entry of the Long Term Plan Order principally on the ground that it was urging the court to vacate the Consent Decree entirely (J.A. 246; see also J.A. 256-258, 298-300). In the court of appeals, the City challenged only one substantive aspect of the Long Term Plan Order that concerned its state law authority to grant tax abatements (Pet. App. 31a). The court of appeals affirmed the entry of the Order (*id.* at 31a-32a). None of the petitioners challenges that aspect of the court of appeals' decision here.

[19] The City Council passed this resolution the day after this Court denied the City's petition for a writ of certiorari to review the court of appeals' affirmance of the district court's liability and remedy orders (108 S. Ct. 2821 (1988)).

previous commitments to implement the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order (J.A. 345-346).

6. At the district court's request (J.A. 347-348), the United States and the NAACP then submitted a proposed order setting a timetable for the City's enactment of the legislation, under penalty of contempt (Pet. App. 10a). In response, the City informed the court on July 11 that it would "not voluntarily adopt the legislation contemplated by" the Long Term Plan Order and the Consent Decree (J.A. 351). Seeking to shirk all responsibility, the City suggested that the court simply enact the Long Term Plan legislation itself (*ibid.*).

In light of the City's response, the district court, at a conference on July 12, raised the possibility of creating a Yonkers Affordable Housing Commission. The proposed entity would be vested with "[a]ll of the governmental functions heretofore vested in the city council insofar as they relate to the housing envisioned by the housing remedy order, consent decree and long-term plan" (J.A. 358). The NAACP favored this alternative (J.A. 362-371, 388-392);[20] both the United States (J.A. 360-362, 385-386, 393) and the City (J.A. 377-379, 392-393) opposed it.[21] In opposing the Commission, the City expressly spoke for the City Council (J.A. 378):

> After giving the court's suggestion due consideration, the City Council wishes to convey its serious concerns regarding a proposal which would, in substance and effect,

---

[20] The NAACP urged the court to avoid taking the preliminary steps of imposing contempt sanctions. Instead, it advocated the court's taking control away from the recalcitrant City Council. See J.A. 363 ("In other words, no fines no jail and simply the most drastic action taken, which would be the stripping of the City of Yonkers' governmental officials directly of their responsibilities.").

[21] Contrary to its representation to this Court (City of Yonkers Br. 15), the City never altered its opposition in the district court to the creation of a Housing Commission, even when the imposition of contempt sanctions was imminent (J.A. 392-393, 403-404).

At the July 12 hearing, the City did favor direct action by the district court, simply ordering the legislation into effect without a vote by the City Council, but the court resisted, saying, "this court is not eager to assume any greater role than the circumstances require, not out of a lack of interest, concern or

> divest the Council of specific state law powers, including core legislative as well as executive functions. • • • The loss of those specifically granted powers must be viewed with great caution and concern from the perspective of a City Council which is popularly elected. As there is little doubt that the City Council would lack the power to delegate those functions to a Commission which is not popularly elected, it is therefore not in a position to consent to such a proposal.

On July 26, the United States proposed, and the district court entered, an order requiring the City, no later than August 1, to enact the legislation (known as the Affordable Housing Ordinance) that had been drafted by the City's consultants to implement the Consent Decree and the Long Term Plan Order (J.A. 397-400).[22] The July 26 Order also scheduled a hearing for August 2, at which time the City and the individual members of the City Council who voted against the ordinance would be required to show cause why each should not be held in civil contempt if the Affordable Housing Ordinance were not enacted (J.A. 398). The Order established the sanctions for such contempt: the City would be fined at a base rate of $100 for the first day and the fine would double for each day of noncompliance thereafter; the Council members would be fined $500 per day and imprisoned after 10 days of continued defiance (J.A. 398-399).[23] All sanctions would end if and when the City enacted the legislation (*ibid.*).[24] By letter dated July 28, in re-

---

power but rather a concept of what the proper role of a federal court is in a circumstance such as this" (J.A. 357).

[22] At a hearing on July 26, the City stated that, except for its previously expressed objections to the Long Term Plan (see pp. 12-13 and note 18, *supra*), it had no objections to the substance of the Affordable Housing Ordinance (J.A. 383-384).

[23] All fines would be paid into the Treasury of the United States and would not be refundable (J.A. 399).

[24] Since the City Council has enacted the ordinance (see p. 17, *infra*), petitioner Spallone is wrong in asserting, indeed boasting (Spallone Br. 3 & n.4, 7 n.11, 9 n.16), that he remains in contempt of court.

sponse to the City's concerns that state law required notice and public hearing before the City Council could vote on the Ordinance, the district court made clear that the July 26 Order would be satisfied if the City Council passed a resolution committing the City to enact the Ordinance after state law requirements had been met (J.A. 401). All petitioners had notice of the court's July 26 Order and its July 28 letter (Pet. App. 12a, 18a).

On August 1, by a vote of four to three, the City Council defeated a resolution declaring the City's intent to adopt the Affordable Housing Ordinance. All four petitioners voted against the resolution (J.A. 403, 420; Pet. App. 12a).[25] Consistent with the July 26 Order, the district court held show cause hearings on August 2 and 4 (J.A. 402-444, 452-476). Each of the petitioners appeared with counsel. Longo and Fagan stated that they had voted against the resolution because there had been no public hearing (J.A. 423-424, 428-429); Chema did not explain his vote (J.A. 436-437, 443).[26] Spallone stated that there were unspecified "serious problems" with the Affordable Housing Ordinance (J.A. 459), and contended that he was not obligated to vote as the court had ordered him to do (J.A. 470-473). Although the court specifically inquired (J.A. 424, 443, 459; see J.A. 474), none of the petitioners identified any substantive objections to the Ordinance. Neither the City (see J.A. 403-411) nor any of the Council members contended that the Affordable Housing Ordinance was inconsistent with the Consent Decree.

---

[25] At its August 1 meeting, the City Council scheduled for August 15 a public hearing on the Affordable Housing Ordinance, as required by state law. Following the August 15 hearing, the City Council again rejected the Ordinance by a vote of 4 to 3. Pet. App. 13a, 16a-17a.

[26] Chema's counsel argued that the court should have first held the City in contempt, and should have considered contempt against his client only if the City did not then comply (J.A. 436-438). In an affidavit submitted to the court of appeals (J.A. 506-508), Chema stated that the Long Term Plan did "nothing to address those people left behind in substandard housing on the West Side," and that the public had expressed its opposition to the adoption of the Long Term Plan legislation at the August 1 City Council meeting (J.A. 506-507).

Finding that their refusal to comply with the Consent Decree was "but the latest of a series of contempts" (J.A. 416), the district court adjudged the City and the four Council members in civil contempt and imposed sanctions in accordance with the July 26 Order (J.A. 416-417, 429-430, 443-444, 445-450, 475-476, 494-496).[27]

7. On August 17, the court of appeals stayed the contempt sanctions pending appeals by the City and the individual Council members (J.A. 510-511). On August 26, the court of appeals affirmed the adjudications of contempt against both the City and the Council members, but limited the fines against the City so that they would not exceed $1 million per day (Pet. App. 1a-35a). The court concluded that neither the City nor the Council members could escape responsibility for refusing to comply with the Consent Decree that the Council itself had approved (*id.* at 28a, 30a-31a).

8. On September 1, after this Court had stayed imposition of sanctions against the Council members pending timely filing and disposition of petitions for a writ of certiorari, but had denied the City's motion for a stay (J.A. 512), and with the City's contempt sanction approaching a fine of $1 million per day, the City Council finally enacted the Affordable Housing Ordinance (J.A. 528-557).[28] On the same date, the City Council passed resolutions stating its intent to amend the Ordinance and to move for a modification of the district court's orders relating to the 260 units of public housing (J.A. 558-559). At a con-

---

[27] In response to the Council members' contentions that they had been given inadequate time to prepare, the court allowed each of them until August 5 to request an evidentiary hearing that, if requested, would be held on August 8. The court ordered that all fines paid by the Council members would be held by the Clerk of the District Court until August 12, pending such a hearing. None of the Council members requested a hearing. J.A. 441-442, 475-476.

[28] The City paid a total of approximately $820,000 in contempt fines. The Council member petitioners each paid $3,500 in such fines. Pet. App. 190n-200n.

ference on September 14, the district court offered to consider proposed modifications, but none has ever been sought (*ibid.*).[29]

On March 6, 1989, this Court granted certiorari with respect to the Council members' petitions. 109 S. Ct. 1337. The City's petition for a writ of certiorari was denied. 109 S. Ct. 1339.

SUMMARY OF ARGUMENT

A. As this Court has squarely held, "[t]here can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966). This power extends not only to parties to the action but to those in privity with them, including their officers, agents, and employees. See Fed. R. Civ. P. 65(d), 70, 71; *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945). In this case, the record shows that petitioners, as officers of the City of Yonkers and members of the City Council, obstructed the City's compliance with the district court's orders to remedy illegal racial segregation of the City's public and subsidized housing—the initial Housing Remedy Order, the Consent Decree, the Long Term Plan Order, and finally the July 26 Order. This pattern of disobedience is precisely the type of conduct that traditionally has warranted the considered exercise of a court's civil contempt power. Under these circumstances, the district court acted well within appropriate bounds in exercis-

---

[29] Within days, the City's and the City Council's willingness to implement the Housing Remedy Order (or to acknowledge the district court's authority to do so if the City refused) was again tested. On September 22, the court of appeals issued its decision in *Yonkers Racing Corp.* v. *City of Yonkers*, *supra*, directing the district court and the parties to seek an alternative to the Seminary site as a location for public housing. 858 F.2d at 872; see p. 12, *supra*. The City flatly refused to cooperate in this process, because "there [was] not majority council support for any site to replace the seminary" (Oct. 4, 1988, Tr. 8). The City made clear that it would not propose or support any alternate site, would not propose that the court designate a site from a list furnished by the parties, would not support the appointment of a commission to designate a site, and would not acknowledge the court's authority to designate a site (*id.* at 5-15).

ing its civil contempt power in order to bring about the long overdue compliance with federal court orders vindicating federal constitutional and statutory rights.

B. Although they challenge the imposition of contempt sanctions on a number of grounds, petitioners essentially advance one unsettling proposition: as members of a local legislative body, they are entitled deliberately to flout valid federal court orders, including the Consent Decree that the City Council itself had approved. That proposition is unacceptable. It is wrong as a matter of federal law, this Court's precedents, and principles of orderly government.

This Court has never considered the common law doctrine of legislative immunity as a license to disobey federal court orders. To the contrary, the Court has emphasized that all government officials, including legislators, are bound to comply with federal law and with the application of that law by the federal courts. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958); *Butz* v. *Economou*, 438 U.S. 478, 506 (1978). Nothing is more fundamental to our system of ordered liberty and the rule of law than the solemn obligation of all citizens, and especially public officials, to obey the law.

Consistent with this overarching principle, the Court "has generally been quite sparing in its recognition of claims to absolute official immunity." *Forrester* v. *White*, 108 S. Ct. 538, 542 (1988). Even with respect to *federal* legislative immunity created by the Speech or Debate Clause (U.S. Const. Art. I, § 6, Cl. 1), the Court "has been careful not to extend the scope of the protection further than its purposes require." *Forrester*, 108 S. Ct. at 542. The context of petitioners' actions here—local legislators' interference with and obstruction of federal court orders designed to remedy federal constitutional and statutory violations—precludes application of immunity doctrine to insulate petitioners from contempt sanctions.

In applying the doctrine of immunity to local legislators, this Court has looked to federal common law as a source of authority. The common law tradition offers no support for extending immunity to local legislators from actions to enforce compliance with federal court orders entered against their govern-

ments. To the contrary, federal courts have not hesitated to hold local legislators in contempt for refusing to comply with federal court mandates.

Extending absolute immunity to local legislators in this setting would not be "justified by overriding considerations of public policy." *Forrester*, 108 S. Ct. at 542. Far from it. When a federal court issues a decree requiring action by a local government, individual legislators, as officers of that government, have a duty to abide by that order. They may not, at their discretion, choose to obstruct compliance with the decree. Holding a legislator liable for breaching that duty does not interfere with his legislative independence because the underlying order itself has already circumscribed the legislator's discretion to act. Similarly, withholding absolute immunity from local legislators in those circumstances will not unduly interfere with the independence of the local legislature itself. Once a federal court enters an order establishing a local government's liability for certain activities, the court necessarily limits the local government's discretion in connection with those activities. In that situation, local officials, as officers of that government, have a firm duty to remedy the violations of federal law. Cf. *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 458-461 (1979).

Thus, while federal courts must be "sensitiv[e] to interference with the functioning of state [or local] legislators," *United States* v. *Gillock*, 445 U.S. 360, 372 (1980), principles of comity cannot empower local legislators to defy valid federal court orders. That sort of power "would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III." *United States* v. *Nixon*, 418 U.S. 683, 707 (1974). Indeed, it would effectively authorize obstruction of a court's enforcement of federal law by the individuals with the greatest power to do so—those holding the police, the spending, and (of particular importance here) the zoning and condemnation powers of the State or locality.

Supreme Court of Virginia v. *Consumers Union*, 446 U.S. 719, 730-734 (1980), upholding a claim of legislative immunity in a Section 1983 action for injunctive relief against state officials acting in their legislative capacity, does not support such

a claim in the circumstances of this case. Where, as here, action against the Council members was taken at the remedial stage of litigation after repeated frustration of the court's orders; where action by the City Council was necessary to remedy the City's statutory and constitutional violations; and where the City Council itself had voluntarily assumed obligations under the Consent Decree, the immunity recognized in *Consumers Union* should not apply.

C. Nor does the First Amendment shield petitioners from sanctions for obstructing the City's compliance with the court's orders, and particularly for their refusal to vote for the implementing legislation required by the Consent Decree. To the extent the First Amendment applies at all to a legislator's act of voting in his official capacity, petitioners cannot claim such protection here. Petitioners were free to express their views on the merits of the Affordable Housing Ordinance both on and off the Council floor. Compliance with the court's orders, however, required them to perform an official *act*: adopting the Affordable Housing Ordinance. That their official duty to perform this act necessitated use of a word, or words, no more infringes the First Amendment than would a requirement that a public officer issue an order to a subordinate or execute a deed of conveyance. The burden placed on the public official is a result of his official duty and is "unquestionably" justified by "the public interest in obtaining compliance with federal court judgments that remedy constitutional violations" (Pet. App. 28a).

D. Finally, petitioners are misguided in suggesting that the court should have assumed the City Council's legislative duties or transferred those duties to an independent court-appointed commission. Either alternative would have represented a more intrusive use of federal judicial power—the direct exercise of local legislative authority by a federal court—than did invocation of a traditional, well-established judicial remedy. Given the availability of the time-honored remedy of civil contempt, such a step would have done unnecessary violence to democratic values. What is more, neither of petitioners' suggestions would have achieved the important goal of obtaining both present and

future compliance with valid court orders, including the Consent Decree approved by the Council itself. Although such alternatives presumably would have brought about the adoption of the Affordable Housing Ordinance, enactment of the Ordinance was essentially the beginning, not the end, of compliance. Moreover, when the confrontation between federal and local authority was of the City's and the City Council's making, the district court properly exercised its discretion by refusing to surrender to the Council's attack on its authority and by requiring the City and City Council to live up to their commitments.

ARGUMENT

THE DISTRICT COURT PROPERLY IMPOSED CIVIL CONTEMPT SANCTIONS AGAINST INDIVIDUAL MEMBERS OF THE YONKERS CITY COUNCIL FOR OBSTRUCTING THE CITY OF YONKERS' COMPLIANCE WITH VALID COURT ORDERS

A. The District Court Has Authority To Impose Civil Contempt Sanctions Against Individual Members Of The Yonkers City Council For Obstructing The City Of Yonkers' Compliance With Valid Court Orders

1. It is a fundamental aspect of judicial authority that "courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966).[10] As the Court has recognized, "[t]he interests of orderly government demand that respect and compliance be given to orders issued by courts * * *." *United States* v. *United Mine Workers*, 330 U.S. 258, 303 (1947). The contempt power, therefore, "has been uniformly held to be necessary * * * to enable [federal courts] to enforce [their]

---

[10] See, *e.g.*, *United States* v. *United Mine Workers*, 330 U.S. 258, 304-307 (1947); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). See also *Young* v. *United States ex rel. Vuitton*, 481 U.S. 787, 793 (1987) ("it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders"); 18 U.S.C. 401.

judgments and orders necessary to the due administration of law and the protection of the rights of suitors." *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 333 (1904).[31] The reach of this essential power extends not only to the parties themselves but to those in privity with them, including their officers, employees, and agents. See Fed. R. Civ. P. 65(d), 70, 71.[32]

2. In this case, the record plainly shows (and petitioners do not seriously dispute) that petitioners, over a period of time as officers of the City of Yonkers and members of the City Council, obstructed the City's compliance with four district court orders to remedy longstanding and continuing federal constitutional and statutory violations flowing from racial segregation of the City's public and subsidized housing.[33] The Housing Remedy Order, specifically directed to "[t]he City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them" (J.A. 20),

---

[31] In *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 450 (1911), the Court observed:

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery.

[32] See, *e.g.*, *Gunn* v. *University Committee*, 399 U.S. 383, 389 (1970); *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945); *In re Lennon*, 166 U.S. 548, 554 (1897); *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (L. Hand, J.).

[33] Indeed, the City itself concedes that "there was contumacious conduct" (City of Yonkers Br. 12).

Each of these four orders was final and binding on the City. The court of appeals affirmed the Housing Remedy Order and this Court denied review. *United States* v. *Yonkers Bd. Of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), certs. denied, 108 S. Ct. 2821 (1988). The district court denied the City's motion to vacate the Consent Decree and the City sought no further review of that ruling. See pp. 11-12, *supra*. The court of appeals upheld the district court's entry of the Long Term Plan Order (Pet. App. 31a-32a), and neither the City nor petitioners sought review of that ruling in this Court. Finally, the court of appeals upheld the July 26 Order and the adjudication of contempt against the City (*id.* at 28a-31a), and this Court denied the City's petition for review. 109 S. Ct. 1339 (1989).

established the City's obligation to propose and implement the Long Term Plan. The City and City Council, however, steadfastly refused to comply with that Order. See pp. 4-9, *supra*.

The Consent Decree, adopted more than a year and a half after entry of the Housing Remedy Order, further defined the terms of the Long Term Plan and required the City and the City Council to enact the necessary legislation to implement the Plan (J.A. 222). Again, the City and the City Council had the legal duty to enact legislation in accordance with the Decree and to negotiate in good faith on its details. Yet again, the City and the City Council continued their program of steadfast resistance, highlighted by the City Council's resolution of June 14, 1988, declaring a moratorium on all public housing construction in Yonkers. See pp. 11-13, *supra*. The district court's entry of the Long Term Plan Order, as a result of the recalcitrance of the City and the City Council, defined precisely the steps to be taken by responsible City officials to remedy segregated public and subsidized housing. Yet, the City Council refused to budge; it responded on June 28 by defeating a resolution that would have required the City to honor its previous commitments to implement the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order (J.A. 345-346).

It was only at this juncture that the district court entered its July 26 Order, incorporating the Affordable Housing Ordinance (drafted by the City's consultants in accordance with the Long Term Plan Order), requiring enactment of the Ordinance by a certain date, and establishing sanctions for noncompliance. Consistent with its previous stance, the City Council, with petitioners leading the charge, acted in defiance of the court's order, thereby preventing the City once again from achieving compliance. See pp. 15-17, *supra*.[14]

---

[14] Certain petitioners contend (Chema Br. 45-47; Longo and Fagan Br. 22-26) that the Affordable Housing Ordinance and the Long Term Plan from which it was drawn are inconsistent with the Consent Decree. Petitioners did not raise this issue in the district court or in the court of appeals, and they have therefore not preserved it for review. *E.g., United States* v. *Lovasco*, 431 U.S.

3. In this situation of deliberate noncompliance with remedial orders, the district court possesses authority to exercise its contempt power to secure compliance. *First*, the record belies the suggestion that petitioners "were in a very real sense strangers" to the litigation and the court's orders (Longo and Fagan Br. 28). Petitioners, as members of the City Council, actively participated in the remedial process; indeed, they thwarted that process by deliberate steps aimed at obstructing the City's compliance with the court's valid orders. That is precisely the type of conduct that traditionally has warranted exercise of a court's civil contempt power. See, *e.g.*, *In re Lennon*, 166 U.S. at 548; *United States* v. *Hall*, 472 F.2d 261, 264-267 (5th Cir. 1972) (Wisdom, J.); *Griffin* v. *County School Bd.*, 363 F.2d 206, 207 (4th Cir. 1966) (en banc).

Second, the district court is not disabled from exercising its power because petitioners were not named parties in the underlying litigation. Federal Rule of Civil Procedure 65(d) reflects the well-settled rule that "[t]o render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have

---

783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, this belated point is without merit since the Long Term Plan Order and Affordable Housing Ordinance are fully consistent with the Consent Decree. Nothing in the Ordinance contradicts the Consent Decree's proviso requiring only zoning changes that "are not substantially inconsistent with the character of the area" (J.A. 222). In fact, Article V of the Ordinance expressly requires that "the provisions of the underlying zoning * * * [and] the impact of development on surrounding land uses and neighborhoods" be taken into account before allowing "[d]epartures from [existing] zoning regulations" (J.A. 548). And all such zoning changes must be submitted to the Yonkers Planning Board for its approval (J.A. 550-554). Nothing in the Consent Decree suggested that the City Council was to have the power to vote on each proposed zoning change. Indeed, before the district court, the City objected to the creation of a separate "Implementation Office" to assist developers, arguing that this function should be carried out not by the City Council but by the City's planning department. The district court ordered the creation of a separate office, and neither the City nor the petitioners sought further review of that ruling.

been actually served with a copy of it, so long as he appears to have had actual notice." *In re Lennon*, 166 U.S. at 554. In addition, the initial Housing Remedy Order specifically enjoined petitioners, as "officers" of the City,[35] to take steps to remedy the City's constitutional and statutory violations; the district court's subsequent orders implicitly mirrored that directive. Petitioners are therefore in no position to evade the district court's contempt process. See Fed. R. Civ. P. 71; *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945).

Third, the Consent Decree, which the City Council itself approved, reconfirmed the district court's authority to proceed against petitioners for obstructing the City's compliance. Contrary to petitioners' sweeping contentions (Spallone Br. 36-40; Chema Br. 38-40, 43-44; Fagan and Longo Br. 26-28), the Decree bound *all* members of the City Council to comply with specific court-ordered obligations, whether petitioners personally agreed to it or not. Fed. R. Civ. P. 65(d); see *Regal Knitwear Co.*, 324 U.S. at 14-15. The City Council's approval of the Decree was "not the action of any separate member or number of members, but the action of the body as a whole." *United States* v. *Ballin*, 144 U.S. 1, 7 (1892). "When one accepts an office of joint responsibility, whether on a board of directors of a corporation, the governing board of a municipality, or any other position in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order[s]." *United States* v. *Fleischman*, 339 U.S. 349, 356-357 (1950).

As members of the Yonkers City Council, petitioners were subject to the district court's orders directing the City of Yonkers to remedy its illegal racial segregation of public and subsidized housing. When petitioners embarked on a continuous course of conduct to block the City's efforts to comply

---

[35] Under state law, petitioners, as members of the Yonkers City Council, are "officers" of the City of Yonkers. See N.Y. Pub. Off. Law § 2 (McKinney 1952).

with those orders, the district court acted well within the traditional bounds of judicial authority.

B. The Doctrine Of Legislative Immunity Does Not Shield Individual Members Of The Yonkers City Council From Sanctions For Obstructing The City Of Yonkers' Compliance With Valid Court Orders

In the face of this justifiable exercise of the federal court's contempt power, petitioners each contend (Spallone Br. 19-35; Chema Br. 24-32; Longo and Fagan Br. 11-20) that the doctrine of legislative immunity absolves them from any obligation to comply with the district court's orders and shields them from sanctions for their decision to obstruct the City's compliance with those orders. This cannot be. This Court has never considered the common law doctrine of legislative immunity as a license to disobey federal court orders, especially orders aimed at remedying basic violations of federal constitutional and statutory law. On the contrary, the Court has emphasized that all government officials, including legislators, are bound to comply with federal law, and with federal courts' application of that law. As the Court stated in *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958), "[n]o state legislator * * * can war against the Constitution without violating his undertaking to support it." See *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) ("all individuals," whatever their position in government, are subject to federal law").

Consistent with this overarching principle, the Court "has generally been quite sparing in its recognition of claims to absolute official immunity." *Forrester* v. *White*, 108 S. Ct. 538, 542 (1988). The Court specifically "has been careful not to extend the scope of the protection [of immunity] further than its purposes require." *Ibid.* Thus, contrary to petitioners' broad assertions, neither this Court's precedents, the federal common law of immunity, nor considerations of public policy serve to insulate petitioners' conduct from a federal court's authority to enforce its own orders.

1. This Court's leading decisions recognizing immunity for state or regional legislators arose out of actions in which private

plaintiffs sought to hold legislators liable under the Civil Rights Act of 1871, 42 U.S.C. 1983. In *Tenney* v. *Brandhove*, 341 U.S. 367, 376, 379 (1951), the Court concluded that Congress, in enacting that statute, had not intended to abrogate the common law immunity enjoyed by state legislators. It thus held that state legislators are immune from Section 1983 damages liability for their legislative acts. The Court extended this common law immunity from damages actions to members of a two-state regional planning commission in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 402-406 (1979). And in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 730-734 (1980), the Court upheld a claim of legislative immunity in a Section 1983 action for injunctive relief brought against members of a state Supreme Court for their refusal to amend the state bar code to permit attorney advertising.[16]

The recognition of legislative immunity under Section 1983, which is explicitly grounded on common law practices, serves two principal purposes. First, the immunity protects individual state legislators from the hazards and distractions of litigation resulting from decisions they must make in carrying out their legislative duties, a purpose shared by all common law official immunities. *E.g.*, *Tenney*, 341 U.S. at 377; *Lake Country Estates*, 440 U.S. at 405; see *Forrester*, 108 S. Ct. at 543. Second, the immunity, based on traditional principles of comity, guards against undue federal interference with state legislative functions. See *Consumers Union*, 446 U.S. at 731-733; *United States* v. *Gillock*, 445 U.S. 360, 370-373 (1980).

The Court has made clear (445 U.S. at 370), however, that "federal interference in the state legislative process is not on the same constitutional footing" as federal judicial interference with the affairs of Congress. The latter raises a question of separation of powers between coequal branches, a question explicitly addressed by the Speech or Debate Clause of Art. I, § 6, Cl. 1 of the Constitution. Thus, "where important federal interests are

---

[16] The Court allowed suit against the same defendants in their enforcement capacities. See note 45, *infra*.

at stake [in the actions of state legislative officials], as in the enforcement of federal criminal statutes [against those officials], comity yields." 445 U.S. at 373.[37]

2. The civil contempt proceedings against the individual members of the City Council in this case were designed to stop those members from obstructing the City's compliance with valid federal court orders – orders entered in a civil rights action brought by the United States against the City to redress the City's longstanding violations of the Constitution and federal civil rights laws. The context of this case is therefore far removed from the circumstances in which this Court has upheld claims of legislative immunity – private actions brought directly against state legislators in the first instance seeking monetary or injunctive relief as a result of particular legislative decisions.[38] It

---

[37] In *United States* v. *Gillock*, 445 U.S. 360, 373 (1980), the Court therefore held that state legislators may not invoke the doctrine of legislative immunity to claim an evidentiary privilege in a criminal prosecution. See also *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974) ("the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress * * *' " (quoting *Gravel* v. *United States*, 408 U.S. 606, 627 (1972)).

[38] Although this Court has not resolved the question, see *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 404 n.26 (1979), the courts of appeals have agreed that local legislators – like their state counterparts – are immune from private actions brought under Section 1983 that challenge their legislative decisions. See *Aitchison* v. *Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed* v. *Village of Shorewood*, 704 F.2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp.* v. *Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); *Kuzinich* v. *County of Santa Clara*, 689 F.2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1193-1194 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Bruce* v. *Riddle*, 631 F.2d 272, 274-279 (4th Cir. 1980); *Gorman Towers* v. *Bogoslavsky*, 626 F.2d 607, 611-614 (8th Cir. 1980). The Second Circuit assumed the correctness of those decisions (Pet. App. 25a), but recognized that such immunity could not relieve petitioners of their obligation to comply with federal court orders remedying violations of federal law, at least where the City Council itself had approved the Consent Decree that required them to enact the remedial legislation (*id.* at 25a-28a).

This case does not present the question whether local legislators are immune from liability under 42 U.S.C. 1983 or the Fair Housing Act. For that reason,

is precisely this difference in context that argues powerfully against application of legislative immunity to shield petitioners' actions from legal process.

a. Federal common law traditionally has not extended to local legislators an immunity from actions to enforce compliance with federal court orders entered against municipal or county governments. In reliance on the "widely followed common-law rule that only discretionary functions are immune from liability," *Westfall* v. *Erwin*, 108 S. Ct. 580, 584 n.4 (1988), federal courts have recognized that local legislators have no license to defy valid court judgments. See, *e.g.*, *Amy* v. *The Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1870) (county legislators held liable in damages for refusing to comply with federal court judgment against the county).[39] When confronted with disobedience to federal court judgments entered after local governments had defaulted in their obligations to bondholders, this Court has held that federal courts may issue writs of mandamus to compel local legislatures to satisfy those judgments. See, *e.g.*, *Yost* v. *Dallas County*, 236 U.S. 50 (1915); *East St. Louis* v. *Amy*, 120 U.S. 600 (1887); *Mobile* v. *Watson*, 116 U.S.

---

and because the Second Circuit assumed that petitioners were entitled to the same immunity available to state legislators, this case does not present an occasion for the Court to decide the issue left unresolved in *Lake Country Estates*.

Significantly, all of the decisions cited above involved local legislators' immunity from actions for *damages* under Section 1983, and did not address the question of their immunity from actions for injunctive relief. As discussed at pp. 30-32, *infra*, in light of this Court's decisions approving the issuance of court orders to compel legislative action where necessary to execute federal court judgments, it is apparent that local legislators are not immune from injunctive relief in all circumstances. Correspondingly, we submit, they must also be subject to the courts' inherent contempt powers to enforce that relief.

[39] In *Amy* v. *The Supervisors*, 78 U.S. (11 Wall.) at 138, the Court observed:

> The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect.

289 (1886); *Labette County Commissioners* v. *Moulton*, 112 U.S. 217 (1884); *County Commissioners* v. *Wilson*, 109 U.S. 621 (1883); *Commissioners* v. *Sellew*, 99 U.S. 624 (1878).[40] As the Seventh Circuit noted a generation ago, "[c]ourts have for years compelled city councils to do their legal duty, though the performance of that duty may require the exercise of discretion and be in the performance of legislative functions * * *." *Connett* v. *City of Jerseyville*, 125 F.2d 121, 124 (7th Cir. 1942).

Under this established common law tradition, individual legislators may not only be held liable in damages for refusing to comply with federal court orders, they may also face contempt sanctions for their disobedience, see, *e.g.*, *Commissioners* v. *Sellew*, 99 U.S. at 627.[41] In *Sellew*, the Court stated (*ibid.*):

> When a copy of the writ which has been ordered is served upon the clerk of the [County Board of Commissioners], it will be served on the [County], and be equivalent to a command that the persons who may be members of the board

---

[40] Accord *Rees* v. *City of Watertown*, 86 U.S. (19 Wall.) 107 (1873); *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867); *City of Galena* v. *Amy*, 72 U.S. (5 Wall.) 705 (1866); *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535 (1866); *Supervisors* v. *United States*, 71 U.S. (4 Wall.) 435 (1866); *Board of Commissioners* v. *Aspinwall*, 65 U.S. (24 How.) 376 (1860).

[41] For lower court adjudications of contempt, see, *e.g.*, *In re Copenhaver*, 54 F. 660, 668 (C.C.W.D. Mo. 1893) (justices of county court acting as legislative body); *United States* v. *Green*, 53 F. 769, 772 (C.C.W.D. Mo. 1892) (city aldermen); *The President ex rel. Moran* v. *Mayor*, 40 F. 799, 805 (C.C.D.N.J. 1889) (city council members); *United States ex rel. Thompson* v. *Lee County*, 26 F. Cas. 911, 914 (C.C.N.D. Ill. 1869) (No. 15,589) (county board of supervisors). See also *United States ex rel. Jones* v. *City of West Palm Beach*, 94 F.2d 320, 321-322 (5th Cir. 1938); *United States ex rel. Watts* v. *Justices of Lauderdale County*, 10 F. 460, 461-462 (C.C.W.D. Tenn. 1882); *United States ex rel. Huidekoper* v. *Buchanan County*, 24 F. Cas. 1288, 1289 (C.C.W.D. Mo. 1878) (No. 14,679).

State courts have also followed the common law practice of not extending to local legislators an immunity from actions to enforce compliance with court orders. See, *e.g.*, *State ex rel. Baumann* v. *Judge*, 38 La. Ann. 43, 44-45 (1886) (members of city council held in contempt); *State ex rel. Edwards* v. *District Court*, 41 Mont. 369, 373-377, 109 P. 434, 436-437 (1910) (city aldermen held in contempt); *People ex rel. Pierce* v. *Guggenheimer*, 44 App. Div. 399, 400, 60 N.Y.S. 703, 705 (1899) (members of city council held in contempt).

> shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for contempt.

The common law tradition thus offers no support for extending immunity to local legislators from actions to enforce compliance with federal court orders entered against their governments.

b. In the context of this case, extending such immunity to local legislators is not "justified by overriding considerations of public policy." *Forrester,* 108 S. Ct. at 542. To the contrary, when a federal court issues a decree requiring local governmental action, individual legislators incur a duty to abide by that order. They are not at liberty to obstruct compliance. *E.g., Sellew,* 99 U.S. at 627. Holding a legislator liable for breaching that duty (by obstructing the court's order) does not interfere with his legislative independence; his discretion to act has already been circumscribed by the underlying order itself. For the same reason, the absence of immunity will not subject individual legislators to the risk of liability "for mere mistakes in judgment." *Butz,* 438 U.S. at 507; see *Westfall,* 108 S. Ct. at 584.[42]

Similarly, holding legislators liable to contempt sanctions for obstructing compliance with federal court orders will not subject them to proceedings based "upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney,* 341 U.S. at 377. Legislators can avoid such proceedings by carrying out their fundamental duty to obey court orders. Should they thwart those orders and persist in such disobedience, legislators can (and should) anticipate the resulting contempt proceedings, in which their liability would be objectively determined, without

---

[42] In *Westfall,* 108 S. Ct. at 584, this Court recognized:

> When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. * * * Because it would not further effective governance, absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity.

regard to their motive or intent. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

To be sure, in fashioning the remedy, a court should be mindful of legislative prerogatives and give due respect to the views of local authorities. *Brown* v. *Board of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). But where, as here, local authorities default in their legal obligations and then actively obstruct compliance with the court's orders, the court must prescribe the remedy (*id.* at 15-16). In those circumstances, the court "has not merely the power but the duty to render a decree which will so far as possible" remedy the violation. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

This by no means suggests that legislators are left, as petitioners would have it, to the whim of a single judge clothed with Article III power. Once the court enters its decree, the appellate process provides a safeguard against unlawful or unnecessary remedial requirements. But if the order is neither stayed nor overturned, then the local government has the clear duty to implement the decree, see *United Mine Workers*, 330 U.S. at 293, a duty shared by the municipality's officers, including members of its governing legislative body. See *Fleischman*, 339 U.S. at 356-357 (quoted at p. 26, *supra*); *Regal Knitwear Co.*, 324 U.S. at 13-14; *Commissioners* v. *Sellew*, 99 U.S. at 627; Fed. R. Civ. P. 65(d).[43]

---

[43] Cf. *Bush* v. *Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La.), aff'd *sub nom. Denny* v. *Bush*, 367 U.S. 908 (1961) (state legislature enjoined from obstructing local school desegregation orders).

In an earlier decision, the three-judge court in *Bush* had disclaimed an intention to enjoin the state legislature in its performance of any legislative function. See *Bush* v. *Orleans Parish School Bd.*, 188 F. Supp. 916, 922 (E.D. La. 1960). In the later decision cited above, however, the court determined that the legislature's enactment of statutes designed to interfere with the desegregation of the Orleans Parish Schools was a plain violation of the court's orders. 191 F. Supp. at 873. Accordingly, the court ultimately enjoined the legislature from seeking to enforce those statutes "and from otherwise interfering in any way with the operations of the public schools * * * pursuant to the orders of this court." *Id.* at 879.

Thus, while the courts must be "sensitiv[e] to interference with the functioning of state [or local] legislators," *Gillock*, 445 U.S. at 372, principles of comity do not, and should not, license local legislators to defy valid federal court orders. Such an immunity "would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III." *United States* v. *Nixon*, 418 U.S. at 707. Moreover, it would effectively authorize obstruction of a court's enforcement of federal law by the individuals with the greatest power to do so—those holding the police, the spending, and (of particular importance here) the zoning and condemnation powers of the state or locality. See *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964).[44] Indeed, as the City acknowledges (City of Yonkers Br. 9), an extension of immunity to City Council members in this context would "in a very real sense [place] a Sword of Damocles over [the City's] head." The City thus realizes that if legislative immunity were granted, it could be faced with heavy fines, and even bankruptcy, as a result of actions by those who knew in advance that they ran no individual risk of contempt.

3. The record establishes (see pp. 4-17, *supra*) that petitioners, as individual members of the Yonkers City Council, obstructed the City's compliance with the district court's orders to remedy racial segregation of the City's public and subsidized housing. Each of those orders (see note 33, *supra*)—the initial Housing Remedy Order, the Consent Decree, the Long Term Plan Order, and the July 26 Order—progressively narrowed the options available to the City and City Council to conform to

---

[44] Indeed, the Yonkers City Council not only exercises all legislative authority on behalf of the City (see Charter of the City of Yonkers art. III, § C3-1.A (1966) (Pet. App. 209a)); it also exercises considerable executive authority, including the power to appoint the City Manager, "the chief executive and administrative officer of the city." *Id.* art. IV, § C4-1. The City Manager remains in office at the pleasure of the City Council and "may be removed, in the absolute discretion of the Council, by [an appropriate] resolution." *Id.* art. IV, § C4-2; see also J.A. 521-522. This concentration of governmental authority in the City Council highlights the dangers to government under law of extending to local legislators an immunity from complying with federal court decrees.

constitutional and statutory requirements. With the court's entry of the July 26 Order, the City Council's mandate was defined precisely—the Council was either to enact by August 1 the ordinance drafted by the City's consultants in accordance with the Long Term Plan, or face specific contempt sanctions. In sum, petitioners brought contempt sanctions on their own heads by preventing the City, acting through the City Council, from adopting the ordinance in accordance with the district court's orders and the City's own commitments.

This case is thus quite different from *Consumers Union*, 446 U.S. at 730-734, where the Court held that the doctrine of legislative immunity barred a Section 1983 action for injunctive relief. Contrary to petitioners' passing suggestions (Spallone Br. 32; Chema Br. 30), *Consumers Union* does not, for reasons discussed below, support extending to local legislators an immunity from actions to enforce compliance with federal court orders entered against their governments.

a. In *Consumers Union*, plaintiffs filed an action against the members of the Supreme Court of Virginia, in their legislative capacities, for failing to amend the state bar code in light of *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). The *Bates* decision, however, was not a court decree that enjoined the Supreme Court of Virginia or the State for which it was acting. Nor did the ruling in *Bates* impose a precisely defined duty on state bar authorities to amend their respective ethical codes. See *Bates*, 433 U.S. at 383-384.

Here, in contrast, petitioners were personally subjected to legal proceedings only after judgment had been entered against the City; the City had defaulted in its remedial obligations largely as a result of petitioners' efforts; the Council itself had agreed to enact the necessary legislation; and the terms of that legislation had been precisely defined. Where the "duty sought to be enforced [was] clear and indisputable" (*Board of Commissioners* v. *Aspinwall*, 65 U.S. (24 How.) 376, 382 (1860)), petitioners had neither the authority nor an occasion to "exercise judgment and discretion" (*Kendall* v. *Stokes*, 44 U.S. (3 How.) 86, 98 (1845)) in refusing to obey court orders and in obstructing the City's compliance.

b. In *Consumers Union,* the plaintiffs' rights could be vindicated through an injunction barring enforcement of the offensive provisions of the state bar code.[45] See 446 U.S. at 734-737. Here, implementation of the Long Term Plan depended upon enactment of legislation; under the Yonkers City Charter, the City Council enjoys exclusive authority to carry out that task. See note 44, *supra.* Where action by the City Council was necessary to remedy the City's statutory and constitutional violations, the court plainly had authority to compel that action. *Griffin* v. *County School Bd.,* 377 U.S. 218, 233 (1964); *Alexander* v. *Holmes County,* 396 U.S. 19, 21 (1969);[46] see

---

[45] Indeed, rather than seeking an injuction requiring the Supreme Court of Virginia to amend the state bar code, the plaintiffs sought a declaratory judgment and an injunction barring enforcement of the code's advertising provisions. See 446 U.S. at 726. And this Court upheld that relief against the Supreme Court of Virginia in its enforcement capacity. *Id.* at 736. In analyzing applications of legislative immunity, this Court has paid careful attention to the availability of other means of correcting or deterring illegal official conduct. See, *e.g., United States* v. *Gillock,* 445 U.S. at 372-373 (criminal sanctions available); *O'Shea* v. *Littleton,* 414 U.S. at 503 (criminal sanctions available); *Powell* v. *McCormack,* 395 U.S. 486, 503-506 (1969) (relief available against congressional employees).

[46] As this Court recognized in *Brown II,* 349 U.S at 301, dismantling entrenched systems of segregation and discrimination may require "revision of local laws and regulations." Thus, legislative actions by boards of education, city councils, and other local legislative bodies are often essential aspects of the remedy in civil rights cases. In school desegregation cases, courts have required school boards to formulate, adopt, and implement desegregation plans. See, *e.g., Columbus Bd. of Educ.* v. *Penick,* 443 U.S. 449, 453-455 (1979); *Green* v. *County School Bd.,* 391 U.S. 430, 442 (1968). In actions brought under the Fair Housing Act, courts have ordered local legislatures to take a variety of legislative actions. See, *e.g., United States* v. *City of Parma,* 661 F.2d 562, 577 (6th Cir. 1981) (upholding order requiring city to enact welcoming ordinance), cert. denied, 456 U.S. 926 (1982); *Lac Vieux Desert Band of Lake Superior Indians* v. *Waterssmeet Township,* No. M82-161 CA (W.D. Mich. Sept. 2, 1987), slip op. 4 (remedial order enjoins township from levying taxes on Indian housing project); see *United States* v. *Town of Cicero, Illinois,* No. 83 C 413 (N.D. Ill. May 15, 1986), slip op. 6 & App. A (consent decree requires town to enact specific Fair Housing Resolution). And in actions brought under the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.,* courts have directed legislative bodies to formulate and adopt election plans in

Bond v. *Floyd*, 385 U.S. 116, 131 (1966) (in action for injunction against state legislature and individual legislators, Court has jurisdiction to review legislature's power to exclude a prospective member).[47]

c. Finally, the City Council, by approving the Consent Decree, voluntarily assumed the obligation to abide by the general terms of the Long Term Plan and to enact the legislation necessary to implement the Plan.[48] Thus, the City's own govern-

---

accordance with the requirements of the Constitution and the statute. See, *e.g.*, *United States* v. *Onslow County*, 683 F. Supp. 1021 (E.D.N.C. 1988) (three-judge court); *Clark* v. *Marengo County*, 623 F. Supp. 33 (S.D. Ala. 1985), aff'd, 811 F.2d 609 (11th Cir 1987); *Jordan* v. *City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984).

[47] Indeed, in holding that the common law immunity available to state legislators does not extend as far as the immunity enjoyed by federal legislators under the Speech or Debate Clause, this Court contrasted *Bond* v. *Floyd* with *Powell* v. *McCormack*, *supra*, which held that the Speech or Debate Clause barred a similar action against members of Congress. *Gillock*, 445 U.S. at 370 n.9.

[48] Petitioners' substantive challenges to the Consent Decree were not raised in the court of appeals and are therefore not preserved. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, those claims are meritless.

Petitioner Chema contends (Chema Br. 40-42) that the Consent Decree was not consensual. That assertion is wrong. See pp. 10-11, *supra*. The City was under threat of contempt in January 1988, *not* for its failure to enter into a consent decree but rather for its refusal to comply with the Housing Remedy Order, specifically its failure to submit a current HAP to HUD. Rather than undermining the validity of the Consent Decree, as petitioner Chema would suppose, the need for that threat of contempt simply highlights the longevity and extent of the City's contumacious behavior and the ultimate necessity for the sanctions at issue here. Moreover, the only action possibly spurred by the threat of contempt was the passage of the HAP. Before the parties agreed to the terms of the Consent Decree, a majority of the City Council had already agreed to vote to approve the HAP, thus removing potential contempt sanctions. And on January 25, 1988, when the parties informed the court that they had reached an agreement, the court stated that if there had been no agreement, it would have entered an order designating six public housing sites. The court did not state that it would have held the City in contempt if agreement had not been reached, or that it would have taken any action at that time with

ing body removed the question whether to enact the implementing legislation from the arena of discretionary legislative functions. The City Council did not cause the City to move to amend the Decree in order to delete or modify both the City's and the City Council's obligations under the Long Term Plan. Nor did it cause the City to appeal the denial of the City's motion to vacate the Decree.[49] Instead, the Council, with petitioners at the helm, simply refused to honor the commitment it had made just six months earlier.

This defiance may not be excused on the pretextual ground that the Consent Decree failed to spell out the terms of the legislation in detail. The terms of the Long Term Plan Order were substantially in accordance with the Consent Decree and were those proposed by the City during negotiations. When the City refused to negotiate the final details, the court was justified in entering the Long Term Plan Order and ordering the City to

---

respect to the Long Term Plan. Two days later, the City Council approved the Consent Decree.

Petitioner Spallone contends (Spallone Br. 40) that "the integrity of the consent decree and the propriety of the proposed legislation" should be questioned. That claim is groundless. Spallone apparently bases his argument on the court of appeals' decision requiring the parties to seek an alternative to the Seminary property as a site for public housing. See *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 872-873 (2d Cir. 1988), cert. denied, 109 S. Ct. 1527 (1989). In that decision, however, the court of appeals upheld the removal of state court proceedings to federal court "to adequately protect the integrity of the Consent Decree" (858 F.2d at 865), and approved the City's condemnation of another site under that Decree (*id.* at 865-868, 873). The court of appeals did not question the integrity of the Consent Decree and did not even address the propriety of the proposed legislation at issue here. Far from undermining the validity of the Consent Decree, the court of appeals commended "[t]he patience exhibited by the district court under enormously trying circumstances" and urged the implementation of the Housing Remedy Order "as quickly, and hopefully as smoothly, as possible" (*id.* at 872, 873). In fact, on remand from *Yonkers Racing Corp.*, the district court designated a substitute site for the Seminary property. See J.A. 615-619. The court of appeals recently has affirmed that ruling. See *United States* v. *Yonkers Bd. of Educ.*, No. 89-6050 (2d Cir. Apr. 17, 1989).

[49] Petitioners here represent a voting majority of the Yonkers City Council. For discussion of the Council's powers, see note 44, *supra*.

enact legislation in accordance with it. See Pet. App. 21a-22a. In any event, the Council never enacted any legislation at all, as it had promised to do in the Consent Decree, and none of the petitioners suggested any substantive changes in the Long Term Plan Order or the Affordable Housing Ordinance to the district court.

As summarized by the court of appeals (Pet. App. 27a), "[n]o litigant, least of all public officials sworn to uphold the Constitution of the United States, may be permitted to avoid compliance with solemn commitments they have made in a consent judgment entered by a federal district court to remedy constitutional violations." Petitioners thus should not be afforded a safe harbor in the immunity recognized by *Consumers Union* in very different circumstances.

C. The First Amendment Does Not Shield Individual Members Of The Yonkers City Council From Sanctions For Obstructing The City Of Yonkers' Compliance With Valid Court Orders

Petitioner Chema alone contends (Br. 33-38) that the district court violated his First Amendment right to free speech by subjecting him to contempt sanctions for his obstruction of the City's compliance with the court's orders, and particularly for his refusal to vote for the implementing legislation required by the Consent Decree. This novel argument is without merit. No decision of this Court examining the individual rights of federal or state legislators has considered as protected speech a legislator's act of voting in his official capacity. Rather, the Court has looked to other common law and constitutional principles in resolving individual legislators' challenges to constraints on their activities. See, *e.g.*, *Lake Country Estates*, 440 U.S. at 402-405 (doctrine of legislative immunity); *Gravel* v. *United States*, 408 U.S. 606 (1972) (Speech or Debate Clause); *Tenney* v. *Brandhove*, 341 U.S. 367 (Speech or Debate Clause and doctrine of legislative immunity); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880) (separation of powers principle).

As the Court's analysis in these cases reflects, common law legislative immunity, together with applicable constitutional

provisions and principles, such as the Speech or Debate Clause and separation of powers, offer legislators the necessary and appropriate protections from undue interference with their legitimate legislative activities. See, *e.g.*, *Tenney*, 341 U.S. at 372; *Lake Country Estates*, 440 U.S. at 403. Accordingly, whatever protections petitioners would have under the First Amendment for actions or failure to act in their official capacity should be no broader than those derived from the doctrine of legislative immunity. To contend that the act of legislative voting enjoys greater First Amendment protection than this would suggest that the resulting legislative enactments would similarly be protected by the First Amendment from statutory and constitutional constraint—an obviously untenable proposition.

To the extent that the First Amendment applies at all to a legislator's act of voting in his official capacity,[50] petitioner

---

[50] Only two federal court decisions have been found suggesting that the First Amendment has any application to a legislator's act of voting. In *Wrzeski* v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983), the district court granted a preliminary injunction against enforcement of a city council ordinance requiring each member to vote "aye" or "no" on every resolution (or face censure or fines). In concluding that the plaintiff council member had "a reasonable likelihood of success on the merits of her free speech claim," the court emphasized that under the council's procedures, a vote of "no" was functionally indistinguishable from an abstention, and thus no discernible purpose was served by requiring a "no" vote instead of an abstention (*id.* at 668-669). We do not agree with the *Wrzeski* rationale, but in any event the present case is clearly different: here, a "no" vote by a Council member constitutes official defiance of a federal court order based on the Council's own consent to the entry of a decree. Thus the purpose of subjecting a "no" vote to the sanction of contempt in this case is manifest.

In *Clarke* v. *United States*, 705 F. Supp. 605 (D.D.C. 1988), appeal pending, No. 88-5439 (D.C. Cir.) (argued Apr. 20, 1989), the district court held that the "Armstrong Amendment" (Tit. I, § 145 of the District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269), which conditioned the appropriation of funds to the District of Columbia on the District of Columbia City Council's modification of one of its laws, placed "an unjustified burden on the first amendment rights" of the City Council members (705 F. Supp. at 613). We disagree strongly with this opinion, and have challenged that judgment on appeal on a number of grounds. But the case, once again, is very different; indeed, the district court in *Clarke* itself distinguished the

Chema cannot claim such protection here.[51] The Council members, including Chema, were free to express their views on the merits of the Affordable Housing Ordinance both on and off the Council floor. Compliance with the court's orders, however, required them to *act* by adopting that Ordinance. That their official duty to perform this act necessitated the use of a word, or words, no more infringed the First Amendment than would a requirement that a public officer issue an order to a subordinate or execute a deed of conveyance. Council members, like other government employees required in their official capacities to express and implement policies they might not personally endorse, have no First Amendment right to refuse to carry out those duties:

> Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

Connick v. *Myers*, 461 U.S. 138, 163 n.3 (1983) (Brennan, J., dissenting).

Here, the district court's orders required petitioners to perform a lawful task within the scope of their official duties. If they could not reconcile their obligations as city officials with

---

present case on the basis of the "compelling and public interest in obtaining compliance with federal court orders" (705 F. Supp. at 610), as well as the existence of "the Council's own prior agreement to a consent decree" (*id.* at 610 n.6).

[51] The inapplicability of the First Amendment to the situation at issue here—the imposition of civil contempt sanctions for Council members' obstructing the City's compliance with federal court orders—is perhaps best suggested by petitioner Chema's internally contradictory contentions that the district court's orders amount to both "compelled speech" (Chema Br. 35) and a "prior restraint" (Chema Br. 36), and by his syllogistic statement that "[h]is vote in the legislature was speech protected by the First Amendment because it was a voice vote" (Chema Br. 18).

their individual views and were unwilling to carry out that task, their recourse was to resign their offices. In a system of law, they were emphatically not at liberty to defy the law. As the court of appeals correctly concluded, "the public interest in obtaining compliance with federal court judgments that remedy constitutional violations unquestionably justifies whatever burden on expression has occurred" (Pet. App. 28a). Accordingly, the freedom of individual Council members under the First Amendment to express their views "does not permit them to take action in violation of law" (*ibid.*).

D. The District Court Properly Exercised Its Discretion To Bring About Compliance With Its Orders By Holding Individual Members Of The Yonkers City Council In Contempt Rather Than By Ordering Legislation In Effect Itself Or By Appointing A Commission To Do So

Petitioners (Spallone Br. 42-47; Chema Br. 20-24; Longo and Fagan Br. 20-21), joined by the City of Yonkers (City of Yonkers Br. 11-15), contend that the district court erred in imposing civil contempt sanctions against the Council members in order to require them to comply with its orders. In their view, the district court should have either enacted the legislation itself or appointed a commission to do so. Accordingly, petitioners and the City assert that either alternative would have been "less intrusive" than ordering the City to comply with the court's orders and subjecting the members of the Council to contempt. We disagree. Indeed, in our view, either alternative would have been a greater exercise of federal judicial power than the course actually taken.

1. The requirement that, in enforcing compliance with a lawful order, a court exercise " '[t]he least possible power adequate to the end proposed' " (*Shillitani* v. *United States*, 384 U.S. at 371 (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230-231 (1821)), applies *not* to the choice between contempt and another remedy for the contemnor's disobedience, but rather to the choice between civil or criminal contempt, together with the

choice of particular sanctions. See *Shillitani,* 384 U.S. at 371 & n.9.[52] Thus, while alternatives to contempt may be available (see Fed. R. Civ. P. 70),[53] there is no authority for the proposition that the use of such alternatives is mandatory.[54]

---

[52] Indeed, the complete statement in *Anderson* v. *Dunn,* a case involving the imposition of sanctions for contempt of Congress, makes clear that the principle enunciated in *Shillitani* does not limit a court's power to choose contempt as a method of enforcement, but only governs the severity and duration of sanctions imposed for contempt:

> The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?
>
> Analogy, and the nature of the case, furnish the answer—"*the least possible power adequate to the end proposed*;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious. And even to the *duration* of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.

Anderson v. *Dunn,* 19 U.S. (6 Wheat.) at 230-231.

[53] Compare *Supervisors* v. *Rogers,* 74 U.S. (7 Wall.) 175 (1868) (approving appointment of a federal marshal to levy and collect taxes to satisfy a judgment, where state law specifically authorized such appointment as an alternative to contempt), with *Yost* v. *Dallas County,* 236 U.S. 50, 57 (1915) (disapproving lower court's effort to levy tax, where state law did not so authorize).

[54] In *United States* v. *Paradise,* 480 U.S. 149, 174-177 (1987), the plurality opinion concluded that the lower court's determination to impose race conscious relief was "plainly justified," and rejected a suggestion, which had not been made to the district court, that fines should have been imposed instead. The plurality opinion did not rule that the imposition of fines would have been improper, but rather that it would not have been sufficient under the circumstances of that case. *Ibid.*

Similarly, this Court has authorized federal courts to impose remedial electoral reapportionment plans on state and local jurisdictions "pending later legislative action" where local officials have failed to act or an election is imminent. *Wise* v. *Lipscomb,* 437 U.S. 535 (1978); see also *Reynolds* v. *Sims,* 377

In any event, either the court's own enactment of the legislation, or its appointment of a Commission to carry out the City Council's responsibilities under the Decree, would have been a greater, not a lesser, exercise of judicial power. See J.A. 519 (Marshall, J. dissenting from grant of stay) ("Surely it is both less disruptive and more effective to order compliance * * * than to usurp completely the Council's legislative authority and enact the legislation directly."). Indeed, as the district court itself said: "[T]his court is not eager to assume any greater role than the circumstances require, not out of a lack of interest, concern or power but rather a concept of what the proper role of a federal court is in a circumstance such as this" (J.A. 357). A federal court's direct assumption of local legislative power, free from the inevitable constraints involved in acting through existing legislative bodies, raises more serious questions of federalism and comity than the course adopted here.

2. In an action for contempt, a district court exercises discretion in determining which sanctions will best "bring[ ] about the result desired." *United States* v. *United Mine Workers*, 330 U.S. at 304; cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15. The court must "assess the effectiveness" of the proposed remedy "in light of the circumstances present and the options available in each instance." *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968). The district court, "having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy * * * would have been effective." *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring). Here, the district court concluded, and the court of appeals agreed, that the imposition of contempt sanctions on both the City and petitioners was the best means of enforcing the

---

U.S. 533, 585-587 (1964). Such judicial action is deemed "provisional * * * so as not to usurp the primary responsibility for reapportionment which rests with the legislature." *Id.* at 586. However appropriate such enforcement mechanisms may be in the circumstances of those cases, they would not have been the best remedies for the City's defiance here. See pp. 44-47, *infra*.

court's orders and the "least possible power *adequate* to the end proposed" (Pet. App. 21a). On this record, that conclusion is unimpeachable.

a. The immediate end proposed was the City Council's enactment of the Affordable Housing Ordinance, an action essential to the implementation of the Long Term Plan and a step the City Council had expressly agreed to in the Consent Decree. Petitioners suggest (*e.g.*, Spallone Br. 46-47; Longo and Fagan Br. 27-28) that the court should have enforced this obligation by holding only the City in contempt. The district court, however, exercised its sound discretion in concluding that under all the circumstances in July and August 1988, such an order would not have been an effective remedy. Although the prospect of the imposition of contempt sanctions against the City alone had induced compliance in the past, by the summer of 1988, both the City and the City Council had made clear in advance that they would not "voluntarily adopt the legislation contemplated by the [court's orders]" (J.A. 351; see J.A. 345-346). Indeed, the City had stated that it was willing to return as much as $30 million in federal funds to avoid compliance. See pp. 11-12, *supra*. Since the Council was the only entity within the City that could bring about compliance, and since the City faced bankruptcy if the Council did not enact the Ordinance, coercive sanctions against the individuals personally and officially responsible for obstructing the City's compliance with the court's orders were justified.[55]

b. Moreover, enactment of the legislation by the court (or by a court-appointed Commission) would not have advanced the ultimate goal of implementing the Housing Remedy Order to alleviate the City's racially segregated public and subsidized housing. The district court recognized as much in January 1988,

---

[55] In retrospect, it appears that the sanction against the City was the principal factor in securing compliance. But it was far from clear that this would be so at the time the district court entered the July 26 Order and imposed contempt sanctions on petitioners. Moreover, the imposition of sanctions against petitioners—even though subject to a stay on the date the Ordinance was finally adopted—may also have played a significant part in achieving compliance.

when it ordered the City to pass the long overdue HAP (J.A. 175):

> There are limits and disadvantages to the practice of deeming things to have been done. One cannot deem housing to have been built. The building of housing is a complex matter which requires a multitude of proceedings and actions.

Simply ordering the legislation into effect would only have postponed the Council's next effort to obstruct the remedy, an eventuality that, in light of the Council's past conduct, the court recognized was likely (J.A. 357): "Obviously, if the city council were to say, well, Judge Sand, those are your orders, you do with them what you will but at some point we will reassert our authority, then we are engaged in an exercise which doesn't get housing built."

To avoid such future confrontations, the court proposed the creation of a Commission to take over the City Council's responsibilities entirely (J.A. 357-359). But the City, speaking expressly for the City Council, strenuously opposed creation of a Commission (J.A. 377-379), and none of the petitioners advocated that proposal until it appeared in their interest to do so—after the district court had imposed contempt sanctions and this matter reached the court of appeals. The Commission alternative thus promised only to create a new opportunity for City and Council defiance (see J.A. 407). The district court wisely chose not to follow that course.[56]

3. As the district court has recognized throughout this protracted and often bitter litigation, the prospects for the Housing

---

[56] Indeed, when it later became necessary to designate a substitute public housing site, the City even refused to acknowledge the court's authority to appoint a commission or to designate a site itself. See note 29, *supra*. Accordingly, despite the City's strenuous efforts to explain before this Court its "seemingly inconsistent positions with respect to the Affordable Housing Commission" (City of Yonkers Br. 14), the City apparently remains unwilling or perhaps unable to acknowledge its obligation to implement the district court's remedial orders. Indeed, the City is still incapable of taking a definitive position. See, *e.g.*, City of Yonkers Br. 15 ("The City's position now is that the Commission remains a possible solution to future problems.").

Remedy Order successfully to desegregate public and subsidized housing in Yonkers will improve greatly only if and when the Yonkers community finally accepts the legitimacy of that Order. But such acceptance will not come as long as the City and its officials continue to deny and defy the federal court's authority to enforce its remedial orders. Even with the Affordable Housing Ordinance now enacted, the implementation of the Long Term Plan will require many actions by City officials over the course of years. The cooperation of those officials will be essential to its success. As the United States stressed in support of its motion for contempt, the City and the City Council were deliberately avoiding responsibility for implementation of the housing remedy. Indeed, they were seeking to put the entire onus of implementation on the court (J.A. 360-362, 385-386, 393; see J.A. 349-353).

The United States argued in the district court that, in these circumstances, it was essential for the City to "take responsibility for its actions" (J.A. 361), and for the court "to take action to make sure that [its] orders [were] obeyed" (J.A. 393). The district court, upheld by a unanimous court of appeals, properly agreed with this assessment. Displaying the restraint that Article III courts must evince, the district court emphasized that federal courts should act only when there is "no responsible state or local authority that will act," and that the City must "recognize its obligation to conform to the laws of the land" by complying with the court's orders (J.A. 407). Thus, the district court's action is fully consistent with the solemn obligation of the federal judiciary to safeguard and vindicate the rule of law, including the higher law of the Constitution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
DAVID K. FLYNN
LINDA F. THOME
Attorneys

JUNE 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00302